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No. 90-985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The parties are correctly set forth at page ii of the Petition for Writ of Certiorari.*

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* Respondents mistakenly assert that Petitioners omitted the Prince William Women's Clinic from the list of Respondents. *See* Brief for Respondents in Opposition at 2 n.2. On the contrary, Petitioners have included this entity. *See* Petition for Writ of Certiorari at ii.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
ARGUMENT	
I. THE DECISION BELOW DOES NOT REST UPON INDEPENDENT STATE GROUNDS	1
II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS	2
III. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND UNSETTLED	4
A. Class-based animus	5
B. Right to interstate travel	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	Page
Bunting v. City of Columbia, 639 F.2d 1090 (4th Cir. 1981)	2
Griffin v. Breckinridge, 403 U.S. 88 (1971)	5
Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980)	2
Heath v. Brown, 807 F.2d 1229 (5th Cir. 1987) (per curiam)	2
Lewis v. Pearson Foundation, Inc., 917 F.2d 1077 (8th Cir. 1990) (en banc)	3, 4
Lewis v. Pearson Foundation, Inc., 908 F.2d 318 (8th Cir. 1990), *vacated*, No. 88-1293 (8th Cir. Sept. 7, 1990) (en banc)	3
Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989)	3, 6
National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990)	4
New York State NOW v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990)	7
Roe v. Abortion Abolition Society, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987)	3
United Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 834 (1983)	5, 6

Statutes

42 U.S.C. § 1985(3)	1, *passim*
42 U.S.C. § 1988	2

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REPLY TO BRIEF IN OPPOSITION

The petition for certiorari in the case at bar raises the question of the applicability of the Ku Klux Klan Act, 42 U.S.C. § 1985(3), to anti-abortion activities. The petitioners submit the present reply brief pursuant to Supreme Court Rule 15.6.

I. THE DECISION BELOW DOES NOT REST UPON INDEPENDENT STATE GROUNDS.

Respondents assert that the decision below rests on independent state law grounds. Brief for Respondents in Opposition at 6-9. This is simply not true, as petition-

ers have already demonstrated. *See* Petition for Writ of Certiorari (Pet.) at 23-24. The court of appeals exclusively addressed the federal questions at issue. App. 8a-9a. *See* Questions #1-3, Pet. at i. Petitioners, moreover, have challenged the substantiality of respondents' federal claims for purposes of federal subject matter jurisdiction, a threshold requirement that state law grounds cannot satisfy. *See* Question #4, Pet. at i. Finally, the award of attorney's fees to respondents under 42 U.S.C. § 1988 would necessarily fall with the rejection of their federal cause of action, regardless of the merits of their claims under state law.[1] *See* Question #5, Pet. at i; *see also* Pet. at 24 (citing cases).

In short, the challenged judgment rests entirely on federal law.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The decision of the Fourth Circuit, in the case at bar, is in conflict with decisions in the Fifth and Eighth Circuits. *See* Pet. at 8-10. The decision below also conflicts with a decision by the Central District of California, an appeal from which is now pending before the Ninth Circuit. Pet. at 10-12. Indeed, the district court itself acknowledged, in the case at bar, the "lack of uniformity among courts" on the applicability of § 1985(3) to anti-abortion activities. App. 29a. Respondents have failed to explain away these conflicts.

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[1] As the Fifth Circuit recently reaffirmed, "a party who wins pendent state claims while *losing* all federal claims is not entitled to fees." *Heath v. Brown*, 807 F.2d 1229, 1233 (5th Cir. 1987) (per curiam) (emphasis in original). The Fourth Circuit is in agreement with this rule, *e.g.*, *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980), and no circuit has taken a contrary position, *see* Pet. at 24 (citing cases).

The Fifth Circuit has twice rejected attempts to characterize anti-abortion activities as violative of 42 U.S.C. § 1985(3). *See Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989). In *Roe*, the Fifth Circuit held that the asserted class against whom the anti-abortion defendants had allegedly discriminated—"persons who do not share Defendants' religious beliefs about abortions," 811 F.2d at 932-33—was not a cognizable class under § 1985(3), 811 F.2d at 935-37. And in *Mississippi Women's Medical Clinic*, the same court held that the desire to prevent *abortion* was not equivalent to a discriminatory animus against *women* (or women seeking abortions). 866 F.2d at 794, 797. The holding of the Fourth Circuit in the present case—that efforts to prevent abortion represent invidious discrimination, under § 1985(3), against "women seeking abortions"—is plainly incompatible with these Fifth Circuit precedents.

Respondents, apparently recognizing that the *Mississippi Women's* decision would bar relief to them under § 1985(3) in the case at bar, charge that this decision "is erroneous." Brief for Respondents in Opposition at 12 n.7. Whether or not the decision is erroneous—and petitioners maintain that the Fifth Circuit has correctly decided the relevant issues—the decision of the Fifth Circuit stands squarely in conflict with the decision of the Fourth Circuit in the case at bar.

In *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1990) (en banc), the Eighth Circuit affirmed, by an equally divided court, a district court decision rejecting the use of § 1985(3) against opponents of abortion.[2] The district court had held that the asserted class

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[2] The district court decision is unpublished, but the original panel decision of the court of appeals describes the lower court's holding. *See Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990), *vacated*, No. 88-1293 (8th Cir. Sept. 7, 1990) (en banc).

—"women seeking abortions"—was not cognizable under § 1985(3); the court had further held that sincere opposition to abortion did not satisfy the requirement of class-based discriminatory animus. Pet. at 10. The holding of the Fourth Circuit in the case at bar, by contrast, is that "women seeking abortions" form a valid class under § 1985(3), and that opposition to abortion *per se* satisfies the requirement, under § 1985(3), of an invidiously discriminatory animus. While *Lewis* involved a pro-life crisis pregnancy center, this fact is irrelevant: the legal theory of the class amimus claim was indistinguishable from that of respondents in the present case.[3]

III. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND UNSETTLED.

The petition for certiorari raises important questions about the limits of claims under § 1985(3). Pet. at 12-22. Respondents' assertion that review of these questions is "unnecessary" is simply a thinly veiled expression of disagreement with the merits of petitioners' arguments. *See* Brief for Respondents in Opposition at 14-15. This, of course, is not a reason for denying review.

Nor can respondents seriously deny the importance of the questions presented. Lawsuits using § 1985(3) against anti-abortion individuals have arisen in almost every federal geographical circuit. Pet. at 13 n.4 (listing seventeen cases in nine different circuits). Section 1985(3) is thus the principal means by which abortion facilities are invoking federal jurisdiction over what would otherwise be trespass suits under state law. *See* App. 46a (decision of district court awarding attorney

[3] Respondents do not even attempt to deny that the decision below conflicts directly with *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). In that case the district court held that "women seeking abortions" was not a proper class under § 1985(3). *See* 721 F. Supp. at 1171-72.

fees) (present case "was, essentially, a simple trespass action . . ."). There is, therefore, a clear need for this Court to rule upon the applicability of the Ku Klux Klan Act to efforts of private individuals to prevent human abortion.

The court of appeals, moreover, has expanded § 1985(3) far beyond the scope previously countenanced by this Court.

A. Class-based animus

This Court has construed § 1985(3) to require proof of a "class-based, invidiously discriminatory animus behind the conspirators' action." *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834 (1983) (quoting *Griffin v. Breckinridge*, 403 U.S. 88, 102 (1971)). The decision below rests on two faulty premises: that "women seeking abortion" form a valid class under § 1985(3), and that opposition to abortion is the *per se* legal equivalent of "animus" against women. Pet. at 15-18.

Respondents claim that opposition to "women seeking abortion" is gender-based discrimination in the same way that opposition to blacks seeking to vote is racial discrimination. Brief for Respondents in Opposition at 10-11. Regardless of the merits of this hypothetical analogy, the comparison is inapposite. Respondents have neither alleged nor proven that petitioners—one of whom is a woman—were motivated by the slightest degree of hostility toward women. Pet. at 5. On the contrary, the courts below recognized the undisputed fact that petitioners are motivated by a fundamental concern for the "innocent victims" of abortion, i.e., unborn children, App. 20a (district court opinion) (quoting literature of petitioner Operation Rescue); *see also* App. 5a (court of appeals) (petitioners "are persons who oppose abortion").

The "animus" of petitioners, then, is sincere opposition to abortion. This is an "animus" against an *activity*, not

against a *class*. For example, if a group of monarchists were to block access to a polling place out of sincere opposition to democratic voting, they would possess an "animus" against *voting*, not against "blacks seeking to vote" or "women seeking to vote." This would be so despite the fact that the blockade hindered voting attempts by blacks and women: "Congress wanted to evaluate 'class-based invidious discrimination' through the lens of 'animus or motivation,' not impact." *Mississippi Women's Medical Clinic*, 866 F.2d at 794 (lead opinion of Judge Gee) (citing *Scott*, 463 U.S. at 834-35).

The court below, in essence, has erroneously converted opposition to an action—abortion—into opposition to a class—women or "women seeking abortions." In so doing, the court below negated the statutory requirement of a distinct, class-based animus.

B. Right to interstate travel

This Court has also established that § 1985(3) provides no substantive rights itself, but only vindicates rights found elsewhere. *Scott*, 463 U.S. at 833. In the present case, respondents claim that interference by private parties with access to an abortion facility constitutes infringement of a federal constitutional right to interstate travel simply because some patrons come from across state lines. The court of appeals accepted this outlandish expansion of the right to travel as a proper basis for invoking § 1985(3). Pet. at 18-21.

Respondents claim that the federal constitutional right to travel forbids any conduct, official or private, by which "out-of-state travel is impeded." Brief for Respondents in Opposition at 15. This has never been the law. Indeed, such a principle would make a constitutional tort or a civil rights violation out of any false arrest or even the most petty tortious obstruction of passage, whenever the plaintiff happened to be from another jurisdiction. Yet that, in effect, was the holding of the court below.

Respondents attempt to manufacture limits on the holding of the court of appeals by postulating a distinction between "coercive" sit-ins by opponents of abortion and merely "symbolic" or "persuasive" sit-ins by opponents of, say, apartheid, CIA recruiting, or the war in the Persian Gulf. Brief for Respondents in Opposition at 15. Merely to state this absurd and discriminatory theory is to refute it.

A fair reading of the prior decisions of this Court would foreclose respondents' bizarre claim under § 1985(3). Nevertheless, the Fourth Circuit—like the Second Circuit[4] and various district courts, *see* Pet. at 13 n.4—has endorsed respondents' federal cause of action. The substantial departure of the court below from a proper interpretation of the class animus requirement of § 1985(3), as well as the court's drastic expansion of the federal constitutional right to travel, call for review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case at bar.

Respectfully submitted,

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[4] *See New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).